Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

EDDIE STEWART,

Petitioner,

v.

ADOLPH COORS COMPANY, a Colorado corporation and COORS BREWING COMPANY, a Colorado corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097 (2000), this Court unanimously held that a plaintiff's prima facie case of employment discrimination, combined with sufficient evidence to find that the employer's asserted justification for its action is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. In this race discrimination case, the Tenth Circuit Court of Appeals held that the plaintiff failed to present sufficient evidence of the falsity of the employer's explanation, and upheld the district court's order vacating a jury verdict for the plaintiff.

The question presented is whether, where an employee presents a prima facie case of discrimination, as well as independent evidence showing the employer's asserted justification for its action to be false, and other evidence of racial animus among the employee's managers, a court may nevertheless conclude the employee's evidence is insufficient as a matter of law to prove the asserted justification was pretextual.

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OPINIONS BELOW

The Tenth Circuit opinion (App. A) is reported at *Stewart v. Adolph Coors Company*, 217 F.3d 1285 (10th Cir. 2000). The district court order, consisting of an oral ruling from the bench (App. C) and a summary written order and judgment thereon (App. B) was not published.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on July 6, 2000. A timely petition for rehearing was denied on August 9, 2000 (App. E). The jurisdiction of this Court in invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; ...

42 U.S.C. §1981(a) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to

> sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Petitioner Eddie Stewart, an African-American, was transferred by his employer, Coors Brewing Company, to an adverse job assignment that required him to work in close proximity to a boiling solution of sulfuric and phosphoric acid. A jury found that the transfer was because of his race, and awarded him $60,000 in compensatory and $40,000 in punitive damages. (App. D) The district court vacated the award under Fed. R. Civ. P. 50(b), finding that Stewart, as a matter of law, presented insufficient evidence that the reason Coors offered for the transfer was pretextual. The Tenth Circuit Court of Appeals affirmed.

Stewart was hired as a welder by Coors in 1970. By 1987, he had attained the highest rank of craft specialist in Coors' Construction and Fabrication Services Department. In May, 1992 the management of fabrication services (the "fab shop") bumped Stewart and six other workers at his level down to the job title of Metalworker Helper. The seven continued to perform work in their craft, but at a lower rate of pay.

Two to three months later, Stewart was assigned to work in an area known as electropolish. In this area, workers used an acid solution to remove impurities from stainless steel parts such as beer tubings. The electropolish facility was in a

separate building from the fab shop. The building contained approximately four tanks, each holding some 22,000 gallons of the acid solution. Workers there were exposed to the danger of acid burns, electricity, sharp edges and trip hazards. Supervisors would spend only a few minutes a day there because of the adverse conditions.

The reason for Stewart's assignment to the electropolish area was a central disputed issue in the case. The decision was primarily made by fab shop manager Harold Wheeler and the front-line supervisor of the electropolish area, Darrell Sielsky. At trial, Wheeler testified that he made the assignment because Stewart affirmatively wished to work in electropolish—an explanation never mentioned in the Tenth Circuit's opinion. However, Wheeler had no recollection of any direct discussion with Stewart about Stewart's preferences. Rather, he testified that his belief that Stewart wished to work in electropolish was based on discussions with Ray Evans. Evans was the lead production worker in electropolish at the time of Stewart's assignment in 1992, although he had no managerial authority whatsoever, and was paid substantially less than Stewart before Stewart had been bumped down a few months earlier. Stewart and Evans were the only permanent African-American employees in the fab shop. At trial, Evans denied ever discussing Stewart's transfer to electropolish with Wheeler, and denied telling Sielsky that Stewart wanted to work there. Sielsky did not testify.

Stewart eventually succeeded to Evans' position as electropolish lead. Although Stewart sought transfers to other positions within Coors, the district court excluded from evidence all of his efforts to secure such transfers, ruling that these efforts were relevant only to separate claims of discriminatory failures to promote, which claims had been

dismissed on a summary judgment motion prior to trial. Stewart continued to work in the electropolish area until his 1996 layoff.

Stewart presented evidence at trial of comments and conduct tending to show racial animus among certain members of the small management team of the fab shop, although no racial comments were made by direct supervisors in the context of Stewart's assignment to electropolish. He also presented evidence that fab shop management had previously given him other assignments outside his craft, including a harsh, six-month tour as a laborer on a roofing crew, while other specialists were permitted to work in their craft.

REASONS FOR GRANTING THE WRIT

I.

The Tenth Circuit Failed to Address the Character or Quantity of Evidence Necessary to Demonstrate the Falsity of the Employer's Explanation for its Action

In *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097 (2000), this Court unanimously held that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. *Id.* at 2109. The trier of fact "can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Id.* at 2108.

The Tenth Circuit assumed that Stewart met his burden

of proving a prima facie case of racial discrimination and that the claim properly went to trial. (App. A, p. 5a). Having done so, the panel proceeded to "review the record to determine whether Mr. Stewart presented sufficient evidence that Coors' stated justification was pretextual." (App. A, pp. 5a-6a).

Entirely absent from the Tenth Circuit's opinion is any discussion of the only justification that the decisionmaker himself, Harold Wheeler, stated for assigning Stewart to electropolish. The opinion states—incorrectly—that Stewart was assigned there because of the recommendation of Evans (App. A, p. 6a). The record disclosed that Mr. Wheeler articulated a very different reason: that Stewart was a volunteer for the job:

> Q [by Coors' counsel] Do you have any memory, Mr. Wheeler, of how Mr. Stewart happened to be assigned to the electropolish department or group?
> A Yes.
> Q What do you remember about that?
> A In that case his friend, Ray, was over at electropolish at that time and Ray approached me and said he'd like to have Eddie over there. *And I said, Well, does Ed want to go.*
> Q In electropolish?
> A Yes, over to electropolish.
> Q Okay.
> A And I think he said, I believe so, words to that effect.

On cross-examination, Mr. Wheeler again confirmed this:

Q Now I assume in making this decision you were concerned with whether or not Mr. Stewart wanted to work there; is that right?

A That's true.

Q And you relied on Mr. Evans relaying to you that he believed Mr. Stewart did want to work there?

A Yes.

Stewart exposed this "volunteer" theory as pretextual. Evans denied ever discussing the matter at all with Wheeler, and denied telling Sielsky that Stewart wanted to work in electropolish. Stewart also denied telling management he wished to work there, and questioned the assignment when he was informed of it by Sielsky. Further, the "volunteer" theory was implausible in light of the harshness of electropolish work. The two electropolish workers other than Stewart who testified at trial were transferred there without any input in the matter.

This Court's opinion in *Reeves* did not explore the issue of the kind or degree of evidence that is sufficient to show the employer's asserted justification to be false. The Tenth Circuit's opinion below also failed to consider this issue; rather, it simply—and inexplicably—ignored Stewart's evidence of pretext, entirely failing to discuss it as part of its decision.

Reeves restored to plaintiffs in discrimination cases their right to invite juries to infer illegal motives from the employer's dishonesty about material facts. However, by leaving open the question of what quantum of evidence is sufficient to allow juries to draw that inference, *Reeves* allows lower courts to continue to deprive plaintiffs of the right to a jury trial by rejecting evidence of pretext as insufficient.

II.

The Tenth Circuit Misapplied *Reeves*

A. The Tenth Circuit Disregarded Plaintiff's Evidence of Pretext

The Tenth Circuit's discussion of Stewart's discrimination claim erroneously concludes that he failed to offer sufficient evidence of pretext. Despite this conclusion, the discussion ends with a quotation of the passage from *Reeves* that gives examples of circumstances where an employer would be entitled to judgment as a matter of law even when the plaintiff *has* established a prima facie case and offered sufficient evidence to reject the defendant's explanation:

> [A]n employer [is] entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

(App. A, pp. 7a-8a, citing *Reeves, supra,* 120 S.Ct. at 2109.) Since the panel disregarded Stewart's evidence of pretext, it did not, and could not, even attempt to articulate how either of these exceptions could apply to this case. (*Reeves* was decided after oral argument was held in this case.)

B. The Tenth Circuit Failed to Draw All Reasonable Inferences from Other Evidence Offered by Plaintiff

In *Reeves*, this Court held that the Fifth Circuit impermissibly substituted its judgment concerning the weight of the evidence for the jury's when it disregarded critical evidence supporting the petitioner's prima facie case and undermining the respondent's nondiscriminatory explanation. *Reeves, supra,* 120 S.Ct. at 2111. As examples, this Court criticized the Fifth Circuit for disregarding a directors's age-related comments on the ground that they were not made in the direct context of petitioner's termination, and discrediting evidence that the director was the actual decisionmaker. *Id.*

In this case, Stewart presented direct evidence of persistent racial animus among the small group of fab shop managers. For example, prior to Stewart's assignment to the electropolish area, James Montano, who had been one of Stewart's direct supervisors, made comments to Stewart that "you...people must be all stupid" and "you must have been dragged behind the boat," and called him a "coon." Stewart approached decisionmaker Wheeler to complain about these comments. Wheeler discouraged Stewart from bringing his complaints to Coors' Human Resources Department. Stewart eventually did so when Montano's conduct persisted, but Wheeler never disciplined Montano.

Several managers, including Montano, testified that managers and supervisors worked closely together and shared their knowledge and opinions about craft workers. Stewart argued that evidence of Montano's bias was relevant to show that manager Harold Wheeler, the ultimate decision maker, was not insulated from Montano's influence. *Griffin v. Washington Convention Center*, 142 F.3d 1308, 1312 (D.C. Cir. 1998). The

district court initially recognized this "cross-pollination" in allowing the jury to consider the discrimination claim. However, in setting aside the jury's verdict, the court found Montano's remarks to be "remote," and other conduct and comments to be "at best isolated incidents that if probative are simply isolated." (App. C, p. 22a)

The Tenth Circuit similarly found the incidents to be "isolated," concluding that "anecdotal evidence of discrimination should only be admitted if the prior incidences of alleged discrimination can somehow be tied to the employment actions disputed in the case at hand." (App. A, pp. 6a-7a; citation and internal quotations omitted). This holding conflicts with *Reeves*, which, as noted above, prohibits courts from disregarding evidence of conduct by the employer that undermines its nondiscriminatory explanation, even where that conduct does not occur in the direct context of the adverse employment action.

Finally, neither lower court addressed Stewart's other discriminatory assignments to menial work and work outside his craft, the type of evidence of disparate treatment that this Court held to be probative in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

C. *By Misapplying the Civil Rights Acts, the Tenth Circuit Seriously Undermines the Policy of Preventing Employment Discrimination*

As this Court has observed, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). In that case, this Court restricted the use

of affirmative action programs by governments by holding that all racial classifications they impose must be narrowly tailored measures that further compelling governmental interests. *Id.* at 227. In so holding, this Court has left the Civil Rights Acts of 1964 and 1991 to serve as the most important tool to protect equal employment opportunities for minorities by affording remedies for actual instances of disparate treatment.

By disposing of this case in the summary manner they did, the district court and the Court of Appeals have not merely misapplied the law; they have created a disincentive for litigants and attorneys to pursue cases of this type. Undoubtedly, the growth of civil rights and employment litigation in the Federal district courts has contributed to growing case backlogs and administrative pressures. However, racial equality cannot be a matter of convenience, to be taken seriously by lower courts only when time permits. If this Court's salutary opinion in *Reeves* can be so easily undermined by its misapplication, it will have little effect on persistent racial discrimination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED JULY 6, 2000

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 99-1242

EDDIE STEWART,

Plaintiff – Appellant,

vs.

ADOLPH COORS COMPANY, a Colorado corporation and COORS BREWING COMPANY, a Colorado corporation,

Defendants – Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 97-B-1467)

* * *

Before **BALDOCK**, **KELLY**, and **BRISCOE**, Circuit Judges.

KELLY, Circuit Judge.

This case requires us to examine the grant of a 50(b) motion for judgment as a matter of law in favor of an employer, after an adverse verdict on claims of race discrimination. We affirm.

Appendix A

Background

Eddie L. Stewart, an African-American, was hired by Defendant Coors Brewing Company ("Coors") in 1970 and worked continuously for the company until he was laid off in 1996. During that time, Mr. Stewart was employed primarily in construction and the Fabrication Services department ("the fab shop"). The workers in the fab shop were supervised by several front-line supervisors, who reported to the manager, Harold Wheeler. Mr. Wheeler, in turn, reported to the director Jay Martine.

Mr. Stewart worked his way up from a Class B Welder in 1971 to a multi-craft specialist — the highest skill classification — in 1987. In May 1992, the multi-craft specialist position was eliminated as part of a Coors' reduction in force. Mr. Stewart, along with the other multi-craft specialists, was bumped down to the position of metalworker helper. Two to three months later, Mr. Stewart was assigned to work in the electropolish area of the fab shop. This decision was made by Mr. Wheeler and by Darrell Sielsky, the electropolish area supervisor. Workers in the electropolish area used cranes to lower stainless steel parts into large acid bath tanks containing electrical current in order to remove impurities from the metal components. Mr. Stewart continued to work in the electropolish area until he was laid off in April 1996. Although Coors policy provided for recall rights within one year of being laid off, Mr. Stewart opted to waive those rights in exchange for cash payments of supplemental unemployment benefits.

Appendix A

On March 20, 1996, Mr. Stewart filed a charge of race discrimination with the EEOC. He filed the current action in district court on July 7, 1997 alleging that Coors violated Title VII and 42 U.S.C. § 1981 by subjecting him to different terms and conditions of employment (Claim One), and by not promoting him (Claim Two) because of his race. Mr. Stewart also brought three state law claims: breach of implied contract (Claim Three); promissory estoppel (Claim Four); and breach of express contract (Claim Five). 1 Aplt. App. at 13-22 (Third Amended Complaint). Both parties moved for summary judgment on various of the claims: Coors on Claims One through Four, and Mr. Stewart on Claim Five.

In a December 14, 1998 order, the district court granted summary judgment to Coors on Claims Two, Three and Four and partial summary judgment on Claim One, limiting the charges of race discrimination to Mr. Stewart's assignment to the electropolish area. *See* Aplt. App. at 395. The court originally granted plaintiff's motion for summary judgment on Claim Five, determining that an ambiguous contract existed and the contract should be construed against Coors as the drafter. *See id.* at 412. However, on Coors' motion for reconsideration, the court denied summary judgment, reasoning that once a contract was determined to be ambiguous, the meaning of its terms was a question of fact for the jury under Colorado law. *See id.* at 427; 2 Aplt. App. at 591-92.

At the close of evidence, both parties moved for judgment as a matter of law. The motions were denied and the case was submitted to the jury by special verdict on two claims: (1) "Did Plaintiff prove that Defendant placed him

in the Electropolish area of the Fabrication Services Department because of his race?" and (2) "Did Plaintiff prove that Defendant violated Personnel Policy R-9 by failing to recall him to a Laborer II job after he was laid off?" The jury found for Coors on the second claim, but determined that Mr. Stewart had been assigned because of his race and awarded him $60,000 in compensatory damages and $40,000 in punitive damages. 1 Aplt. App. at 474-75.

After judgment was entered on the jury verdict, Coors again moved for judgment as a matter of law under Fed. R. Civ. P. 50(b) arguing that Mr. Stewart had failed to show any evidence of racial animus, and his claim of race discrimination was time barred. The district court granted the motion, set aside the earlier judgment, and entered judgment in favor of Coors. This appeal followed.

Rule 50(b) motion

We review the grant of a Rule 50(b) motion de novo, reviewing all of the evidence in the record. *See Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536, 2000 WL 743663, at *10 (U.S. June 12, 2000). All reasonable inferences are drawn in favor of the nonmoving party and this court does "not make credibility determinations or weigh the evidence." *Id.* at *11. Judgment as a matter of law is appropriate " 'only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position.' " *Finley v. United States*, 82 F.3d 966, 968 (10th Cir. 1996) (citation omitted). The district court granted judgment as a matter of law to Coors on two alternate grounds: Mr. Stewart's failure (1) to bring

a claim within the requisite statute of limitations; and (2) to present any evidence that the assignment to electropolish was motivated by race. 2 Aplt. App. at 1222, 1224. Mr. Stewart asserts that there was sufficient evidence to support the verdict, and maintains that the district court erred in addressing the statute of limitations defense because Coors failed to raise that issue in its Rule 50(a) motion.

In our review of the sufficiency of the evidence claim, we assume that Mr. Stewart met his burden of proving a prima facie case of racial discrimination and the claim properly went to trial.[1] On the merits, the burden shifting framework of *McDonnell Douglas* is largely irrelevant and the issue is whether the adverse employment action was motivated by race. *See Sanchez v. Philip Morris, Inc.*, 992 F.2d 244, 246 (10th Cir. 1993). This " 'burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' " Reeves, 2000 WL 743663, at *6 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). The plaintiff can meet this burden through the combination of a prima facie case and the presentation of "sufficient evidence to find that the employer's asserted justification is false." *Id.* at *9. Having assumed that a prima facie case was shown, we review the record to determine whether Mr.

---

1. The district court denied summary judgment on this claim because, at the pre-trial stage, Coors had failed to "proffer a non-discriminatory reason for Stewart's assignment to the electropolish area." 1 Aplt. App. at 406. Our assumption in this case does not imply that an assignment from one job to another within the same company department will ordinarily be sufficient to constitute an "adverse" employment action.

Stewart presented sufficient evidence that Coors' stated justification was pretextual.

At trial, Coors demonstrated that Mr. Stewart's assignment was based upon the recommendation of Mr. Ray Evans. Mr. Evans, an African-American and the lead worker in electropolish, spoke with Mr. Sielsky, the electropolish supervisor, and recommended that plaintiff be assigned to electropolish. Mr. Evans testified that his motivation for making this recommendation was to protect Mr. Stewart's job security because electropolish was less likely to be affected by layoffs than other areas of the fab shop. 2 Aplt. App. at 677. He also testified that Mr. Stewart knew about the recommendation. *Id.* at 678. This testimony was corroborated by Mr. Wheeler, the department manager, who testified that plaintiff was assigned to electropolish because of the recommendation of Mr. Evans and "because we had the need at the time." *Id.* at 889-90.

Mr. Stewart failed to show that these reasons were pretextual. First, the circumstances surrounding the assignment do not raise the slightest inference of discrimination. Mr. Stewart's hours, benefits and wages were not adversely affected, and with the exception of Mr. Evans, Mr. Stewart was the only African-American among the several non-minority workers in the electropolish area.

Second, the isolated racial comments which Mr. Stewart attempts to use as proof of racial discrimination are unrelated to the electropolish assignment. As this court recently noted, "anecdotal evidence of discrimination should only be admitted if 'the prior incidences of alleged discrimination

can somehow be tied to the employment actions disputed in the case at hand.' " *Heno v. Sprint/United Management Co.*, 208 F.3d 847, 856 (10th Cir. 2000) (citation omitted). None of the comments in this case were tied to the alleged adverse employment action. Of the several comments, one was made about five years prior to Mr. Stewart's assignment to electropolish and the employee was ordered to refrain from any further such remarks. A later comment by employee Kenny Hall was highly inappropriate but it resulted in Mr. Hall's suspension from work. The only comment which was even attributable to either of the two decision-makers responsible for Mr. Stewart's assignment was a 1995 comment by Mr. Sielsky as to whether "another employee was dumb enough to do [Mr. Stewart's] job in electropolish." 2 Aplt. App. at 742. Even assuming that this comment was racially motivated, we note that it was made some three years after Mr. Stewart's assignment to electropolish and is not probative of Mr. Sielsky's motivations in 1992.

After a thorough review of the record, we agree with the district court that, even when viewed in the light most favorable to the plaintiff, "[t]here is a dearth of evidence that Mr. Wheeler and/or Mr. Sielsky assigned or placed Mr. Stewart in the electropolish area because of his race." 2 Aplt. App. at 1224. Mr. Stewart has failed to offer sufficient evidence to prove that Coors' stated reasons for the assignment were pretextual.

> [A]n employer [is] entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created

> only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Reeves, 2000 WL 743663, at *9. Therefore, the grant of judgment as a matter of law was appropriate.[2]

Express Contract Claim

Mr. Stewart claims that the district court erred in submitting his express contract claim to the jury, rather than granting him judgment as a matter of law. We review de novo the questions of contract ambiguity and the denial of a motion for judgment as a matter of law, viewing the evidence and inferences therefrom in the light most favorable to the nonmoving party. *See Electrical Distrib., Inc. v. SFR, Inc.*, 166 F.3d 1074, 1081-82 (10th Cir. 1999); *Baker v. Barnard Const. Co.*, 146 F.3d 1214, 1220 (10th Cir. 1998).

Coors Policy R-9 clearly provided laid off employees with a right of recall. *See* 1 Aplt. App. at 528 ("Employees on extended layoff have recall rights for a period of time equal to their [company] seniority, or one year, whichever is less."). However, the policy also provided that employees who were subject to recall could "elect to receive supplemental unemployment benefit [sic] in lieu of reassignment or recall rights, after signing a waiver of their

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2. Given Mr. Stewart's failure to present sufficient evidence of racial animus, we need not address the statute of limitations or the issue of punitive damages.

recall rights." *Id.* at 529. Mr. Stewart elected this option and received $7,458 in supplemental unemployment benefits. In doing so, he signed a document entitled "Waiver of Recall Rights" which is at the heart of this contract claim. That document provided in relevant part:

> In consideration for receipt of the supplemental unemployment benefit and/or [sic] Employee waives all rights to recall after sixty days past the date of layoff and as set forth in Policy R-9. Employee understands that if he/she exercises his/her right of recall within 60 days of layoff he/she must re-pay [Coors] the full amount of the Supplemental Unemployment Benefit and the Service Bonus.
>
> . . . .
>
> I HAVE FULLY INFORMED MYSELF OF THE CONTENTS OF THIS WAIVER BY READING IT BEFORE I SIGN IT. I FURTHER UNDERSTAND THAT I GIVE UP MY RECALL RIGHTS BY SIGNING IT AND I SIGN IT VOLUNTARILY.

Id. at 524. Within 60 days after Mr. Stewart had been laid off, a laborer job became available. Coors recalled Mr. Hung Tran — an employee with less seniority than Mr. Stewart but who had not elected to receive supplemental benefits in lieu of recall — to fill this position. *Id.* at 201. At no time during the 60 day period did plaintiff learn of this position or attempt to exercise his right of recall.

Mr. Stewart contends that the language "Employee waives all rights to recall after sixty days past the date of layoff" clearly means that the waiver only became effective on the 61st day. Therefore, his recall rights were still effective and Coors breached the contract by not alerting him to the job opening. Coors contends that either (a) an employee clearly waives all recall rights from day one, absent a revocation in the first sixty days, or (b) the contract is ambiguous and therefore was correctly submitted to the jury. *See Anderson v. Eby*, 998 F.2d 858, 865 (10th Cir. 1993) (meaning of the terms of an ambiguous contract is question for fact finder under Colorado law); *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 912 (Colo. 1996) (same).

"A written instrument is ambiguous when it is reasonably susceptible to more than one meaning, or where there is uncertainty as to the meaning of a term." *Ad Two, Inc. v. City & County of Denver*, 983 P.2d 128, 130 (Colo. Ct. App. 1999). It is clear that the language of the Waiver form was "fairly susceptible to more than one interpretation" as to whether the waiver became effective immediately or only upon the 61st day. *Dorman*, 914 P.2d at 912. On the one hand, the Waiver speaks in language which implies that Mr. Stewart would retain his recall rights, i.e. "[e]mployee understands that if he/she exercises his/her right of recall within 60 days of layoff . . . ." However, Coors Policy R-9 specifically states that the supplemental unemployment benefit was given "*in lieu of* reassignment or recall rights, *after* signing a waiver of their recall rights," 1 Aplt. App. at 529, and the Waiver form itself stated that Mr. Stewart "G[A]VE UP" his recall rights by signing. The evidence also demonstrated that Coors consistently applied its policy to

mean that recall rights were waived from the moment of signing the form. Taking this evidence in the light most favorable to the plaintiff, the waiver was ambiguous and the district court did not err in denying the motion for judgment as a matter of law. The contract issue was properly submitted to the jury, which determined that Coors did not breach Policy R-9.

Failure to Promote Claim

Finally, Mr. Stewart argues that the district court improperly granted summary judgment to Coors on his failure to promote claims. We review the grant of summary judgment de novo, examining the factual record and any reasonable inferences therefrom in the light most favorable to the non-moving party. *See Wolf v. Prudential Ins. Co.*, 50 F.3d 793, 796 (10th Cir. 1995). A review of the record before the district court reflects uncontroverted evidence that management had a justifiable non-discriminatory reason for all of the promotions which Mr. Stewart failed to receive, i.e., the decision was based on seniority and there were more senior employees; Mr. Stewart did not have the requisite welding certifications or attendance record for the job; and a temporary moratorium on bidding for construction jobs kept Mr. Stewart — as well as all other employees — from a new position. Mr. Stewart failed to produce any evidence from which a reasonable inference could be drawn that these non-discriminatory reasons were pretextual. Therefore, summary judgment was appropriate.

AFFIRMED.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED APRIL 15, 1999 AND FILED APRIL 16, 1999, AND DATED APRIL 19, 1999, RESPECTIVELY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action No. 97-B-1467

EDDIE STEWART,

Plaintiff,

v.

COORS BREWING COMPANY,
a Colorado corporation,

Defendant.

ORDER

Pending before the court are the following post-trial motions filed by defendant: 1) motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b); 2) motion for a new trial on race discrimination claim; and 3) motion to vacate punitive damage award. After consideration of the motions and counsels' arguments and for the reasons stated on the record during the April 15, 1999 hearing which are incorporated into this Order, IT IS ORDERED that:

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1) defendant's motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b) is GRANTED;

2) defendant's motion for a new trial on race discrimination claim is DENIED as moot;

3) defendant's motion to vacate punitive damage award is DENIED as moot;

4) defendant's January 15, 1999 motion to alter judgment to exclude recovery of expert witness fees is DENIED as moot;

5) the January 8, 1999 judgment entered on the jury verdict awarding plaintiff compensatory and punitive damages is SET ASIDE and hereby VACATED;

6) the January 20, 1999 judgment entered awarding plaintiff attorney fees and costs is SET ASIDE and hereby VACATED;

7) upon filing of a bill of costs within 10 days from the entry date of this order, defendant is awarded costs; and

8) this case is DISMISSED.

Dated: April 15, 1999 in Denver, Colorado.

BY THE COURT:

s/ Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE LEWIS T. BABCOCK

Civil Action No. 97-B-1467

EDDIE STEWART,

Plaintiff,

v.

COORS BREWING COMPANY,
a Colorado corporation,

Defendant.

JUDGMENT

PURSUANT TO and in accordance with the Order entered April 15, 1999, by the Honorable Lewis T. Babcock, United States District Judge, it is

ORDERED that defendant's motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b) is GRANTED; defendant's motion for new trial on race discrimination claim DENIED as moot; defendant's motion to vacate punitive damage award DENIED as moot; defendant's January 15, 1999 motion to alter judgment to exclude recovery of expert witness fees is DENIED as moot; the January 8, 1999 judgment entered on the jury verdict awarding plaintiff compensatory and punitive damages is SET ASIDE and

hereby VACATED; the January 20, 1999 judgment entered awarding plaintiff attorney fees and costs is SET ASIDE and hereby VACATED. It is

FURTHER ORDERED that the action and complaint is dismissed with prejudice. It is

FURTHER ORDERED that judgment is entered for defendant Coors Brewing Company and against the plaintiff Eddie Stewart. It is

FURTHER ORDERED that defendant shall have its costs upon the filing of a Bill of Costs with the Clerk of the Court within ten (10) days of entry of judgment.

DATED at Denver, Colorado, this 19th day of April, 1999.

FOR THE COURT:

JAMES R. MANSPEAKER,
CLERK

By: s/ Stephen P. Ehrlich
Stephen P. Ehrlich
Chief Deputy Clerk

APPENDIX C — EXCERPTS FROM JUDGE'S RULING FROM BENCH GRANTING DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW

[commencing at page 21]

* * *

Ruling

THE COURT: All right. Coors has moved for judgment as a matter of law on the Title VII race discrimination claim submitted to the jury arguing that the evidence is insufficient to support the jury verdict.

Plaintiff has argued that at the close of the evidence and before the Court instructed the jury Coors moved for judgment as a matter of law pursuant to Rule 50(a) on the basis that there was not a legally sufficient evidentiary basis for a reasonable jury to find for Mr. Stewart on his race discrimination claim and because in making this motion Coors did not address the statute of limitations question or the continuing violation doctrine, which is what it is specifically. This particular ground for the motion at this [22] time is not properly before me.

Rule 50(a)(2) provides that motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to judgment.

A Rule 50(b)(2) motion made after judgment enters cannot assert new matters not presented in the 50(a) motion

made during the trial. **Anderson vs. United Telephone Co. of Kansas**, 933 F.2d at 1503, which is a Tenth Circuit 1991 case that I look to to determine in the first instance whether this continuing violations argument has been preserved.

The **Anderson** Court stated, however, that, "in satisfying the requirements of Rule 50 technical precision is unnecessary and rigid application of the rule is improper where such application fails to serve the rule's purposes." In **Anderson**, as counsel is aware, defendant moved for judgment as a matter of law on the plaintiff's state law civil black listing claim after both parties had rested their cases asserting generally that the evidence was insufficient to support the claim.

The Court deferred ruling on the issue and after the jury returned a verdict against the defendant on this claim the defendant renewed its Rule 50 motion. Then in a supplemental brief supporting that motion a defendant for the [23] first time in the history of that case made the dispositive argument that the defendant's conviction of criminal black listing was a prerequisite to any civil black listing claim. And the district court agreed. The motion was granted.

On appeal the plaintiff argued that the district court erred because defendant did not raise the specific legal point in the original Rule 50 motion. But the Tenth Circuit rejected the argument explaining that the essential purpose of Rule 50's procedural requirement is to prevent a party from surprising the other party and the court as well with new arguments made for the first time after the verdict.

Appendix C

It's to avoid ambush. The party must give notice of potentially dispositive issues before the case goes to the jury so that the other party has the opportunity to present evidence to overcome any claimed deficiencies. And the Tenth Circuit concluded that the defendant had in that case given sufficient notice by generally alleging insufficiency of the evidence.

The plaintiff in **Anderson** was first made aware of the issue after the verdict. Here in this case, unlike in **Anderson**, Coors filed its summary judgment motion on the race discrimination claim arguing in part that the claim was outside of the statute of limitations. The Court addressed the statute of limitations question in its — I addressed it in my order of December 14, 1998, and determined that a [24] four-year statute of limitations applies.

In terms of addressing the continuing violations argument asserted by the plaintiff I determined in that order that at that point in this case the evidence before me on the summary judgment papers was sufficient to carry the question to trial and that, quote, "I will be free to reevaluate these factors," the factors enumerated in my order, "in light of the evidence developed at trial," unquote.

I will say parenthetically at this juncture that the analysis of the continuing violations question in my December 14 order is soft. The issue, and this becomes critical, that was tried to the jury involves the discrete act of assigning Mr. Stewart to the electropolish area of the construction department. And that occurred in 1992.

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As to the survival of the statute of limitations/continuing violation issue I find and conclude that plaintiff was aware of this issue and has had the opportunity to address it both evidentially and certainly at this juncture of the case so that there is no ambush here. The question survives and must be addressed upon defendant's present Rule 50 motion under Rule 50(b).

I agree with the footnote raised in one of the defendant's briefs to the effect that it is not an issue involving the waiver of the issue by failing to request an appropriate instruction, inasmuch as that is a Rule 51 issue [25] and inapposite to the analysis of whether it survives the Court's present analysis under Rule 50(b).

So I am going to address the Rule 50(b) motion on the merits, which includes the question of the statute of limitations as well as the question of the sufficiency of the evidence generally to submit the Title VII claim to the jury for its consideration.

The standard upon which I determine this motion is I believe virtually axiomatic. The Court may grant the motion only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position. I must examine the evidence in the light most favorable to the nonmoving party, including the benefit of all reasonable inferences.

In reviewing the adequacy of the jury's verdict I determine whether there was substantial evidence to support it. I may not weigh the evidence, that is I may not serve as a

juror in making this determination, I may not pass on the credibility of witnesses, and I may not substitute my judgment for that of the jury.

It is undisputed that if the discriminatory act at issue is the assignment of Mr. Stewart to the electropolish area absent evidence of continuing violation from the date of the assignment in 1992 that act was outside the four-year statute of limitations that I determined applies in my [26] December 14 order.

Instruction No. 4 given to the jury provides in part, quote:

"Plaintiff claims in this lawsuit that defendant treated him differently from other employees based upon his race. Plaintiff worked as a multicraft specialist at Coors Brewing Company. In May 1992 plaintiff, along with seven other metal craft specialists, was bumped down to a metal worker helper position. Less than three months after the demotion Coors assigned plaintiff to work in the electropolish area. This department is where stainless steel equipment is immersed in boiling phosphoric and sulfuric acid solution. The working conditions are hazardous and unpleasant. Plaintiff was the only African-American employee in the group of eight demoted multicraft specialists, and he was the only one of these employees assigned to work in the electropolish area.

"Plaintiff worked in the electropolish area until he was laid off. The other white employees were not placed in the electropolish area and were permitted to work in their craft," unquote.

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This is the party's statement of the case and claim instruction. The clear import of that instruction is the, quote, "assignment," unquote, and the, quote, "placement," unquote, of plaintiff in the electropolish area in May 1992.

[27] Question No. 1 of the verdict form reads as follows, quote:

"Did plaintiff prove that defendant placed him in the electropolish area of the fabrication services department because of his race?" The jury answered yes. Close quote. The operative word there is, quote, "placed," unquote.

What the plaintiff argues in essence is that he was not placed or assigned to the electropolish area until 1993 when he was promoted within that job assignment and that because of the promotion, which is certainly not an adverse employment action, nor is it probative of any discriminatory intent, that constituted a final action by the employer which falls within the limitations period and consequently survives the statute of limitations continuing violations problem.

Once again the act complained of by the plaintiff was his, quote, "assignment," unquote, and being, quote, "placed," unquote, in the electropolish area.

My review of my notes taken during the trial reflects that Mr. Montano's racially based statements occurred, and I think this was Mr. Stewart's testimony, in 1987 or 1988, long before he was placed or assigned to the electropolish area. That in any event would be outside the limitations period.

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There was evidence of an inappropriate racial comment by Mr. Hall within the period, but Mr. Hall was appropriately disciplined.

[28] There was some testimony that in 1995 Mr. Sielsky said something to the effect about being dumb and working within the electropolish area, but my recollection of the testimony and review of my trial notes did not peg that to race.

And in any event that evidence was not received as evidence of racially based animus in assigning or placing plaintiff in electropolish in the first place.

It is also my view that these three discrete incidents involving Montano, Hall and Sielsky are just that. Montano's is remote and Hall and Sielsky are at best isolated incidents that if probative are simply isolated.

The **Berry** case, which the parties discuss in their briefs, in view of what I have just analyzed leads to the conclusion that as a matter of law plaintiff's claim of racially based assignment or placement in the electropolish area is outside the statute of limitations. Upon this basis alone I would have to grant the motion to set aside the jury's verdict in this case.

However, there is an even more compelling reason why this motion must be granted and it centers on the testimony of Mr. Evans. In this respect it is the intent and motivation of the decision makers that is crucial. It is undisputed that the decision makers in the assignment or placement of Mr. Stewart in the electropolish area were Mr. Wheeler, [29] Mr. Sielsky or both.

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Mr. Evans testified that he went to Mr. Sielsky. Mr. Evans, who is African-American, was motivated to do so in order to enhance Mr. Stewart's ability to survive the layoffs that were then occurring. Mr. Evans testified that he told Mr. Sielsky that because the plaintiff had been bumped down plaintiff's best opportunity or chance — I think he used the word "chance" to stay employed at Coors was to be in the electropolish area because it provided the, quote, "best job security."

Mr. Evans testified that he told Mr. Sielsky that Mr. Sielsky should, quote, "go after plaintiff," unquote, because the plaintiff was better trained and had skills in welding and reading blueprints.

Mr. Evans testified that it was Mr. Wheeler or Mr. Sielsky who decided to assign — I think he used the words "move in" plaintiff to the electropolish area. And he testified that he told plaintiff about what he was doing.

That testimony was presented by the first witness in the case called by the plaintiff and presented on direct examination. On cross-examination Mr. Evans testified about the various skills necessary for the electropolish area. Mr. Evans testified that the plaintiff was good at those skills and therefore he went to Mr. Sielsky about securing; Mr. Stewart's continued employment by assignment or placement [30] in the electropolish area. And Mr. Evans testified that Mr. Sielsky agreed and talked to Mr. Wheeler. Mr. Evans testified on cross-examination that he believed that he was doing plaintiff a favor because he was facing layoff, but plaintiff had a lot of talent.

Mr. Evans also testified at that juncture that he talked to plaintiff about it.

Mr. Stewart testified that he learned from Mr. Sielsky, who was in terms of the supervisory hierarchy just below Mr. Wheeler, that he was to be assigned to and placed in electropolish. Mr. Stewart testified that he never told anyone that he wanted to be in electropolish.

It's at this juncture that the focus on mental state or animus becomes critical, because as I say, it is the alleged animus racially based on the part of Wheeler and/or Sielsky that is critical.

This evidence is undisputed. And there is at best, at the very best a mere scintilla of evidence that Mr. Wheeler and/or Mr. Sielsky may have harbored any racial animus at all. There is a dearth of evidence that Mr. Wheeler and/or Mr. Sielsky assigned or placed Mr. Stewart in the electropolish area because of his race.

The evidence in this case points but one way and is susceptible to no other reasonable inference otherwise that Mr. Wheeler and/or Mr. Sielsky caused Mr. Stewart to be [31] assigned or placed in the electropolish area because of the action of Mr. Evans, a fellow African-American.

Because I am required under the evidence and law of this case to grant the motion to set aside the jury verdict because it is not supported by sufficient and/or substantial evidence, the question involving setting aside the award of punitive damages is virtually moot. But I fully expect there

will be an appeal of this case, and the issue of punitive damages is one that we are all aware is going to be decided specifically by the United States Supreme Court.

Suffice it to say that in this case Instruction No. 28 required the jury to determine that the discriminatory action complained of was done with malice or reckless indifference to the right of plaintiff to be free from such conduct.

There is not even a scintilla of evidence that Mr. Stewart was assigned to or placed in the electropolish area with malice or reckless indifference as to his race.

I committed two fundamental errors in this case. The first was to submit the Title VII claim to the jury for its deliberation and verdict. The second was to submit the issue of punitive damages to the jury.

I have gone back through my trial notes, which are comprehensive, and combed them very carefully. And I will say that I have the greatest respect and admiration for the [32] results returned by juries. And I was trying to recall a case where I granted a post-verdict motion such as this. And in the civil arena I can think of only one, and that was a motion that had been pending for some time and was resolved dispositively by a Tenth Circuit opinion. I don't treat these motions lightly.

I am going to grant the Rule 50 motion, set aside the jury's verdict on the Title VII claim in its entirety, and in doing so I will award costs to the defendant.

All right. Anything further in this case this morning?

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MR. OADE: Your Honor, at the Court's urging we have been engaging in settlement discussions. We have a settlement discussion with Judge Abrams tomorrow afternoon, and we will continue our efforts to resolve this case.

THE COURT: Well, I encourage that. You know, as I say, I don't — I have never treated these motions lightly. One of the things that in most cases we achieve is closure based upon a trial. And I'm not sure we've achieved that in this case. There are a number of appellate issues really which I suppose have changed somewhat but still remain in the case. And I have always encouraged settlement. The one thing that a trial does is provide a cathartic effect for the parties through litigation. I am not sure that my ruling today is going to be of any benefit in that respect. There's [33] a question whether it is. But when issues are presented to me, my function is to decide the issues and as best one human being can do it.

But of course I heartily encourage a settlement. I don't know if what I have done would further that or whether it would inhibit it. But it's not my job to settle cases, it's my job to try them and to call the rulings as I best see them. But I sure do encourage you to settle the case.

MR. OADE: Your Honor, I would like the Court to know that your ruling has removed the barrier to settling this case. Coors did not want to settle this case because we consider it a stain on the record of Coors, and now that the Court has set that verdict aside we are very amenable to settlement, and we will do everything we can to settle this case.

THE COURT: Well, you know, I didn't enter this ruling in order to remove a, quote, "stain," unquote from Coors' reputation.

MR. OADE: I understand that, your Honor.

THE COURT: And of course in removing the barrier from one side I may have raised a barrier on another side, but that's — you know, that's the way it goes.

MR. OADE: Thank you, your Honor, for your hard work in this case.

MR. LICHTENSTEIN: Thank you, your Honor.

[34] MR. OADE: It was obvious a lot of work went into it.

THE COURT: All right. We will be in recess.

(Proceedings concluded at 10:15 a.m.)

* * * *

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED JANUARY 9, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUDGE LEWIS T. BABCOCK

Case No. 97-B-1467

EDDIE STEWART,

Plaintiff,

v.

COORS BREWING COMPANY,

Defendant.

JUDGMENT

THIS MATTER came on regularly for trial on the 4th day of January, 1999, before the Court and a jury of seven duly sworn to try the issues herein, the Honorable Lewis T. Babcock, Judge, presiding. The trial proceeded to conclusion and the jury subsequently returned a Verdict Form as follows:

QUESTION NO. 1: Did Plaintiff prove that Defendant placed him in the Electropolish area of the Fabrication Services Department because of his race?

ANSWER: YES.

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QUESTION NO. 2: Did Plaintiff prove that Defendant violated Personnel Policy R-9 by failing to recall him to a Laborer II job after he was laid off?

ANSWER: NO.

QUESTION NO. 3: If you answered YES to question 1 above, what amount, if any, do you award Plaintiff as compensation for any emotional pain, suffering, inconvenience, mental anguish or loss of enjoyment of life?

ANSWER: $60,000.00

QUESTION NO. 4: If you answered YES to question 1 above, what amount, if any, do you assess against Defendant as punitive damages?

ANSWER: $40,000.00

It is, therefore,

ORDERED that judgment is entered in favor of the plaintiff, Eddie Stewart, and against the defendant, Coors Brewing Company, in the amount of $60,000.00 in compensatory damages and $40,000.00 in punitive damages for a total amount of $100,000.00. It is

FURTHER ORDERED that interest shall accrue on the total judgment from the date of entry of judgment at the legal rate of 4.545%. It is

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FURTHER ORDERED that the plaintiff shall have his attorney fees and expert witness fees. It is

FURTHER ORDERED that the plaintiff shall have his costs upon the filing of a bill of costs with the Clerk of the Court within ten (10) days of the entry of judgment.

DATED at Denver, Colorado, this 9th day of January, 1999.

FOR THE COURT:

JAMES R. MANSPEAKER,
CLERK

By: s/ Stephen P. Ehrlich
Stephen P. Ehrlich
Chief Deputy Clerk

APPROVED:

s/ Lewis T. Babcock
LEWIS T. BABCOCK
Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 9, 2000

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 99-1242

EDDIE STEWART,

Plaintiff – Appellant,

v.

ADOLPH COORS COMPANY, a Colorado corporation and COORS BREWING COMPANY, a Colorado corporation,

Defendants – Appellees.

ORDER

Filed August 9, 2000

Before, **BALDOCK**, **KELLY**, and **BRISCOE**, Circuit Judges.

Appellant Eddie L. Stewart's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: s/ K. Fabrizio
Deputy Clerk